

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL**

MINUTE ORDER

Date: 10/14/2009

Time: 01:30:00 PM

Dept: C-71

Judicial Officer Presiding: Judge Ronald S. Prager
Clerk: Kathleen Sandoval

Bailiff/Court Attendant: L. Wilks
ERM: Peter Stewart #3184

Case Init. Date: 06/19/1998

Case No: JCCP4041

Case Title: JCCP4041 COORDINATION PROCEEDING
TOBACCO LITIGATION

Case Category: Civil - Unlimited

Case Type: Misc Complaints - Other

Event Type: Motion Hearing (Civil)

Causal Document & Date Filed:

Appearances:

The Court, having taken the above-entitled matter under submission on 10/13/2009 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

RULING AFTER ORAL ARGUMENT: The Court rules on plaintiff People of the State of California's ("Plaintiff") motion for attorneys' fees as follows:

After taking the matter under submission, the Court affirms its tentative ruling.

As a preliminary matter, defendant R.J. Reynolds Tobacco Co.'s request for judicial notice is granted.

On June 9, 2009, this Court determined that Plaintiff was the prevailing party in this action since it prevailed on the issue of whether Defendant's own gatefold ad violated the cartoon prohibition.

The first issue is whether Plaintiff is entitled to market rates for the time spent on this case.

Plaintiff contends that it is entitled to calculate its fees based on prevailing market rates, citing federal (Blum v. Stenson (1984) 465 U.S. 886, 894) and state (PLCM Group Inc. v. Drexler (2000) 22 Cal.4th 1084, 1096 (hereafter "PLCM")). Notably, those cases involved interpretations of statutes which required the application of "reasonable attorney fees." For example, Civil Code section 1717, which requires the application of reasonable attorney fees (i.e., the prevailing market value of comparable legal services), applied to the attorney fee provision at issue in PLCM. (Id. at p. 1098.) This Court specifically found that section 1717 did not apply here. In addition, Section VI.D of the Consent Decree does not provide for reasonable attorney fees but instead requires the payment of attorney fees "incurred."

Defendant contends that section VI.D of the Consent Decree does not provide for prevailing market rates, citing the Ohio MSA court's decision to limit fees to what was incurred. (Defendant's Request for Judicial Notice, Exh. 2, p. 18.) At oral argument, Plaintiff conceded that no other Court has ruled otherwise. Defendant also noted that when the parties to the MSA wanted to value attorney's fees for government lawyers based on private market rates, it did so expressly. (Compare Master Settlement

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Agreement §XVIII(b) with Consent Decree §VI.D.) In *Russello v. United States* (1983) 464 U.S. 16, 23, the U.S. Supreme Court held that courts must give effect to the parties' deliberate choice to use different wording. (See also *Williston on Contracts* §30.26 (4th ed.).) As to the rates incurred, Defendant provided evidence to show that from 2007 to 2009, attorneys and paralegals in the AG's office billed at a rate of \$158.00 per hour and \$101.00 per hour, respectively. (Wright Dec., Exh. C.) From 2009 to 2010, attorneys and paralegals in the AG's office billed at a rate of \$170.00 per hour and \$120.00 per hour, respectively. (*Ibid.*)

However, Plaintiff correctly noted the inapplicability of Government Code section 11044 subd. (b) to this case since it applies when the Attorney General represents or advises a state agency. Here, the Attorney General brought this action on behalf of the People of the State of California.

After reviewing the cases cited by the parties, the Court finds Defendant's interpretation of the statute more persuasive. Thus, Plaintiff's fees shall be limited to the amount incurred, not prevailing market rates.

The second issue is whether the fees should be apportioned. In *Hensley v. Eckerhart* (1983) 461 U.S. 424, 440, the U.S. Supreme Court held that courts should deduct from a lodestar amount for an unsuccessful claim only if the claim is distinct in all respects. Here, the parties provided conflicting evidence regarding the amount of time spent on each issue. (Compare Wright Dec. with Finberg Decs., Posner Decs., and Eckhart Dec.) Notably, Plaintiff informed the Court that it has already applied a 15 percent deduction to its fees it incurred for the unsuccessful claim. (Finberg Dec., ¶22.) After reviewing the evidence provided by both parties, the Court finds that the 15 percent deduction by the Plaintiff was sufficient.

Based on the foregoing, the motion for attorneys' fees is granted in an amount that conforms with the Court's ruling (i.e., the rates and hours actually incurred in the prosecution of this case). This calculation would not include the hours Plaintiff already waived (i.e., 15 percent) in its original request for fees set forth in its moving papers but would include the additional hours requested in its reply. As to Plaintiff's law clerks, an hourly rate of \$50.00 should be applied for services rendered.

IT IS SO ORDERED.